

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MARSHALL ENGINEERED PRODUCTS
COMPANY, LLC

and

Case 18-CA-16303

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE & AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA – UAW, LOCAL 893, UNIT 7

David M. Biggar, Esq., Counsel for the
General Counsel

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Stroster, Esq., and Peter J. Kok, Esq.*
(*Miller, Johnson, Snell & Cummiskey,*
P.L.C.), of Grand Rapids, MI,
for Respondent.

Matthew J. Petrzela, Esq. (Simmons,
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Cedar Rapids, IA, for the Charging Party.

DECISION

Findings of Fact and Conclusions of Law

Benjamin Schlesinger, Administrative Law Judge. Respondent Marshall Engineered Products Company, LLC, discharged three striking employees, David Spillman, Tim Kelley, and Allan Cripps, for alleged misconduct while engaging in picketing. None of them did what Respondent alleged that they did, and its terminations were unlawful under *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).¹

Respondent, with its principal office in Marshalltown, Iowa, is engaged in the manufacture and non-retail sale and distribution of steam heat traps and regulators. During the year ended December 31, 2001,² Respondent purchased and received at its Marshalltown facility goods valued in excess of \$50,000 directly from points outside Iowa. I conclude that Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act. By September 28, the termination date of its collective-bargaining agreement with International Union, United Automobile, Aerospace & Agricultural Implement Workers of America – UAW,

¹ The unfair labor practice charge was filed on March 22, 2002, and the complaint was issued on October 30, 2002. This case was tried in Marshalltown, Iowa, on January 16 and 17, 2003.

² All dates are 2001, unless otherwise indicated.

Local 893, Unit 7 (Union), which I conclude is a labor organization within the meaning of Section 2(2) of the Act, the parties had been unable to reach a new agreement; and the Union began an economic strike the following day. Respondent continued to operate with replacement employees.

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The first alleged act of misconduct involved a rock or other object being thrown at and hitting the vehicle owned by replacement worker Carlos Felix on October 31. Spillman, who was discharged effective that day, by letter dated November 15, denied that he threw anything. Respondent produced no witnesses who testified to this event. Its attempts to find Felix, and two others, whose statements it had relied on in making the decision to terminate, were unavailing. What is left of Respondent's proof is of no value. Even the statement of Felix is worth nothing, because he recanted it; and a criminal charge against Spillman was dismissed based on the fact that Felix verified that, according to the Marshall County Attorney's motion to dismiss the criminal complaint, Spillman was not "one of the individuals throwing the chunk of concrete," as a videotape of the rock-throwing incident that was also placed in evidence in this proceeding so showed. Although the videotape is not wholly conclusive that Spillman was without fault, because, at the moment that the rock or object is heard crashing against Felix's vehicle, Spillman is no longer in the frame of the videotape, Spillman is seen immediately before the sound, within a second or so, running after the vehicle, but carrying nothing in his hand. From viewing this videotape, Kenneth Creech, Respondent's chief financial officer and the human resource director, was able to admit, albeit with the greatest of reluctance, that "Looking at the tape it would appear that Mr. Spillman could not have been involved. . . . It would appear unlikely." Later, he said that it was "highly unlikely" that Spillman threw anything.

I agree, noting that his testimony concedes that Respondent did not meet its burden of proving by a preponderance of the evidence that Spillman did anything wrong. My finding is, however, is more positive and definite. Based on the tape, the utter lack of evidence supporting any basis for disciplining Spillman, and Spillman's credible denial of wrongdoing, I find that he did not commit the Act for which he was disciplined.³ *Burnup & Sims*, supra, reversed a court of appeals ruling that the employer did not unlawfully discharge two employees, whom it believed in good faith had threatened to use dynamite to unionize the employer if the union did not get sufficient authorizations. The Court wrote, 379 U.S. at 22-24:

[W]e are of the view that in the context of this record §8(a)(1) was plainly violated, whatever the employer's motive. Section 7 grants employees, inter alia, "the right to self-organization, to form, join, or assist labor organizations." Defeat of those rights by employer action does not necessarily depend on the existence of an anti-union bias. Over and again the Board had ruled that §8(a)(1) is violated if an employee is discharged for misconduct arising out of a protected activity, despite the employer's good faith, when it is shown that the misconduct never occurred. See, e.g., *Mid-Continent Petroleum Corp.*, 54 N.L.R.B. 912, 932-934; *Standard Oil Co.*, 91 N.L.R.B. 783, 790-791; *Rubin Bros. Footwear, Inc.*, 99 N.L.R.B. 610, 611. In sum, § 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of

³ Both the General Counsel and Respondent contend that the failure of the other to call certain witnesses on the other's case requires an adverse inference that the testimony would have been contrary to the other's interest. I decline to make such an inference. None of the witnesses whom the parties did not call may reasonably be assumed to be favorably disposed to the party not calling them. *Electrical Workers IBEW Local 3 (Teknion, Inc.)*, 329 NLRB 337 (1999), because both parties could have confidence in an available witness's objectivity.

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misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

That rule seems to us to be in conformity with the policy behind §8(a)(1). Otherwise the protected activity would lose some of its immunity, since the example of employees who are discharged on false charges would or might have a deterrent effect on other employees. Union activity often engenders strong emotions and gives rise to active rumors. A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith. It is the tendency of those discharges to weaken or destroy the §8(a)(1) right that is controlling. [Footnotes omitted.]

Accordingly, Respondent's discharge of Spillman, who was guilty of nothing, violated Section 8(a)(1) of the Act. The complaint also alleges that Respondent's discharge of Spillman violated Section 8(a)(3). In his investigation of this incident, Creech asked if there was videotape of the incident, and the security guards told him there was one "showing the rocks flying but the people who had thrown them were hidden by the building and the tree that were out front." The General Counsel questions the scope of his further investigation by not seeking the second videotape, discussed above, but what he did was neither casual nor aimed at disciplining Spillman in particular. He honestly believed, based on three statements of eyewitnesses, that Spillman was the culprit; and he was entitled to rely on what the security guards had told him. That was sufficient. I thus conclude that Respondent did not violate Section 8(a)(3) when it initially discharged him.

On the other hand, once Creech found out about the existence of the second tape at the time when he was preparing for Spillman's unemployment compensation hearing in late December and saw it and formed his opinion that Spillman did not throw the rock or other object, and then Creech learned that Lopez, the principal witness, recanted, Creech could no longer have an honest opinion that Spillman was guilty. Yet, Creech did not reverse his decision. It did not, as Respondent contends, offer to return Spillman to his job without any loss of seniority. Instead, on March 14, 2002, it made an offer conditioned on the settlement of the entire contract, returning Spillman as well as four other employees to the seniority list, awaiting an opening, should one occur, because all the positions had been filled by permanent replacements.

Respondent did not make that offer unconditionally. It did not reverse its discipline of Spillman. It has offered no cogent explanation for the maintenance of the discipline in this circumstance. It is well-settled that, when the asserted reason for an action fails to withstand scrutiny, the Board may infer that there is another reason—an unlawful one which the employer seeks to conceal—for the discipline. *Shattuck Denn Mining Corp.*, 362 F.2d 466, 470 (9th Cir. 1966); *Painting Co.*, 330 NLRB 1000, 1001 fn. 8 (2000). Because Respondent has offered no reason at all, the Board is entitled to make the same assumption.

Accordingly, I conclude that, under *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), Respondent violated Section 8(a)(3) and (1) of the Act. Spillman was engaged in union activities by being a striker, carrying a picket sign, and supporting the Union's cause. Respondent knew that, but nonetheless maintained its discipline of him even when it had no basis for it. Respondent has not demonstrated that it would have taken the same action, even in the absence of his union activities. *Wright Line*; *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

The discharges of Kelley and Cripps, effective November 9, by letter dated November 30, present a closer question, because two witnesses, Brandon Campbell and Arnold Brown, a technical photographer and site commander for the security company hired by Respondent, testified on its behalf. Essentially, Respondent's claim was that on November 9 Campbell and his friend, T.J. Kunz, drove in a borrowed truck to Respondent's plant to apply for a job. Campbell parked in the parking lot owned by R.J. Warnell Trucking, a lot that was used by Respondent's striking employees to park their vehicles while they engaged in picketing and to use a building on the property to store their food. Campbell and Kunz walked over to one of the entrances to the plant, about 100–120 yards, where they were met by Brown, who cautioned them not to park where they had, because the strikers used that lot to park, but to park behind the plant, away from where the picketing was going on. Campbell and Kunz returned to their car, where they were met with an loud and angry reception from Kelley and Cripps. Followed by Warnell, who repeated that he was going to beat up Campbell, he and Kunz quickly got into their truck, which was being rocked from side to side by the two picketers, one on each side of the vehicle, screaming at the occupants, and sped out of the parking lot to escape, during which Kelley pulled off the driver's side-view mirror.

Both Kelley and Cripps denied that they even touched the vehicle and, according to Brown, neither was positioned near the side-view mirror. Respondent's case is suspect for several other reasons. First, I was not otherwise impressed by Brown, particularly when he testified that, from his vantage point 100 or more yards away, he saw Kelley "confront" the job applicants when they came back to the parking lot and that he saw the two striking employees rocking the vehicle. He was positioned too far away to see a "confrontation" and, in the few seconds that he witnessed the incident (he was videotaping other picketing activity), to note accurately all the particulars to which he testified. In addition, he could not have been particularly impressed by what he saw because he never prepared a report about the incident. Campbell had nothing to gain by his testimony, but he admitted that the situation was very stressful, that his heart was pounding, that he had a deep interest in getting out of the parking lot as fast as possible, that his intent and focus upon getting out of that parking lot as quickly as possible could have compromised his ability to perceive events, and that because of the energy of the situation, it might have been possible that he may not in fact have actually seen what he testified to.

I find that he was too frightened to assess the situation and remember it accurately. Rather, I was particularly impressed by the last witness called by the General Counsel, in his rebuttal case, Scott Warnell, a mechanic for and the son of the owner of the R.J. Warnell Trucking, who credibly and candidly placed in perspective what actually had occurred. Although his father allowed the strikers to use the property because he was a friend of a leader of the Union, Warnell did not believe in the Union and had no sympathy for the strike. I find him completely neutral; I find that his recall was almost entirely accurate. On November 9, his 13 year-old son, Colton, and a friend were riding all-terrain vehicles on the lot. He came back to the shop and told his father that one of the strikers had almost run into him. He told the man that he could not park there, and the man (who was Campbell) said: "[F]uck you, I'll park where I want to park." (Campbell testified that, when this young man told him that he could not park there, he replied: "I don't want to fucking deal with you right now.") Warnell became angry and started for the union strike shack on Respondent's property to kick them off his property. In the meantime, Kelley and Cripps were heading over from the picket line to see who the new visitors were, aware that Respondent was hiring strike replacements.

But Warnell did not look at them when Colton pointed to, as the guilty ones, Campbell and Kunz, who were returning from Respondent's office, pursuant to Brown's advice, to move their truck from the lot. Warnell waited for them to come on his property, and then threatened

Campbell: “[Y]ou ever talk to my kid that way again I’ll knock your fucking lights out.” By this time, Kelley and Cripps had come out of the union shack, crossed the street, and were yelling at Campbell and Kunz, calling them scabs, and telling them to go home and to get different jobs. Campbell and Kunz rushed to their truck, all the time followed by Kelley and Cripps, and got in, Campbell driving, as before, and trying to get out of the lot as fast as possible, “[tearing] off just throwing gravel and rocks” because he had been cursed at and threatened by Warnell and was being yelled at by and was fearful of (thanks to Brown) the strikers. In the process, Campbell was so edgy that, when he started the engine of his truck, he immediately threw the truck into reverse and then stalled it, restarted it, spun the wheels and made the tires squeal, and hit one of many deep ridges on the lot (the lot had previously contained a building, and there were still jutting out from the surface big pieces of foundation). That caused the truck to look as if someone was pushing it from side to side, but the truck was just rocking from hitting the foundation of the old building and rolling over chunks of concrete, gravel, and stones. As it did, the mirror on the driver’s side (Warnell inaccurately believed the mirror was on the passenger side) fell off, not because someone was pulling it off, but because the truck was being heaved by the surface of the lot, Campbell was driving erratically in his attempt to leave there as fast as possible, and, probably just as important, the truck was old and rusty. Even Brown did not corroborate that Kelley and Cripps pulled off the mirror, which was the act of vandalism for which Creech discharged them.

Accordingly, I find that Kelley and Cripps were blameless and did nothing to warrant any discipline, no less Respondent’s discharge. Respondent contends that these employees were not engaged in protected activities, because they wandered from the picket line site to investigate what they thought was a verbal, if not physical, altercation between Colton and the two strangers. I have found, however, that they were actually headed over to the parking lot to see whether the two strangers parking in their lot were strikebreakers. That is what Creech thought, too, because his termination letter specifically refers to their “vandaliz[ing] the vehicle of an applicant for employment . . . while on the picket line.” [Emphasis supplied.] In fact, at the time of the alleged incident, they were yelling at the applicants to go home and not to take the strikers’ jobs and calling them scabs. In addition, the law is perfectly clear that, even though the incident did not take place on that small area that Respondent calls the picket line, the Board has never been so limited. See, e.g., *Georgia Kraft Co.*, 275 NLRB 636 (1985). I conclude that, under *Burnup & Sims*, Respondent violated Section 8(a)(1) of the Act. Although the complaint also alleges an independent violation of Section 8(a)(3), the General Counsel withdrew that contention in his brief.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having discriminatorily discharged David Spillman, Tim Kelley, and Allan Cripps, Respondent must offer them reinstatement and make them whole for any loss of earnings and other benefits, in accord with *Abilities and Goodwill*, 241 NLRB 27 (1979), enf. denied 612 F.2d 6 (1st Cir. 1979.), computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent contends that the employees are not entitled to backpay because each testified with great sincerity that in no event would they cross the Union’s picket line to go to work. *Abilities and Goodwill* provides for just such a contingency, the Board stating, 241 NLRB at 28: “[E]ven if the employer fails to offer reinstatement, it remains free to seek to reduce

backpay by presenting evidence that the employees would have refused such an offer if made, or that they failed to make a diligent effort to mitigate the backpay obligation by seeking interim employment elsewhere.” The recommended remedy does not bar Respondent from making this claim in compliance proceedings.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

Respondent Marshall Engineered Products Company, LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees for engaging in concerted and protected activities.

(b) Discharging or otherwise discriminating against any of its employees for supporting International Union, United Automobile, Aerospace & Agricultural Implement Workers of America – UAW, Local 893, Unit 7 or any other union.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer David Spillman, Tim Kelley, and Allan Cripps full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make David Spillman, Tim Kelley, and Allan Cripps, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Within 14 days after service by the Region, post at its facility in Marshalltown, Iowa, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since November 15, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. March 21, 2003

Benjamin Schlesinger
Administrative Law Judge

⁵ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT discharge our employees for engaging in concerted and protected activities.

WE WILL NOT discharge or otherwise discriminate against any of our employees for supporting International Union, United Automobile, Aerospace & Agricultural Implement Workers of America – UAW, Local 893, Unit 7 or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coercing our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL within 14 days from the date of the Board's Order, offer David Spillman, Tim Kelley, and Allan Cripps full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make David Spillman, Tim Kelley, and Allan Cripps, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

MARSHALL ENGINEERED PRODUCTS
COMPANY, LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

330 Second Avenue South, Towle Building, Suite 790, Minneapolis, MN 55401-2221

(612) 348-1757, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (612) 348-1770.